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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE JUAN GUTIERREZ et al., Defendants and Appellants.	B250333 (Los Angeles County Super. Ct. No. BA388274)

APPEAL from judgments of the Superior Court of Los Angeles County, Monica Bachner, Judge. Judgments of conviction affirmed; sentences vacated and remanded for resentencing.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Jose Juan Gutierrez.

Carlo Andreani for Defendant and Appellant Gerardo Jacobo.

Kamala D. Harris, Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Myoshi, Amanda V. Lopez, Michael Keller, Idan Ivri, and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Jose Juan Gutierrez and Gerardo Jacobo were convicted of premeditated attempted murder, assault with a deadly weapon, and related crimes, with gang and firearm use enhancements. Appellants appealed their convictions, raising claims of insufficiency of the evidence, instructional error, and evidentiary error. Gutierrez also requested that this court review sealed transcripts relating to the prosecution's assertion of a governmental evidentiary privilege. In an unpublished opinion filed on March 3, 2016, we affirmed the judgments. (*People v. Gutierrez* (Mar. 3, 2016, B250333) [nonpub. opn.].)

On May 25, 2016, our Supreme Court granted Jacobo's petition for review but deferred further action pending its decision in *People v. Mateo* (rev. granted May 11, 2016, S232674). The court denied Gutierrez's review petition.

While Jacobo's appeal was pending, the Legislature enacted two statutes that are relevant here. Senate Bill No. 620 (Senate Bill 620) gave trial courts the discretion to strike or dismiss certain firearm enhancements. Senate Bill No. 1437 (Senate Bill

1437) amended the law governing application of the natural and probable consequences doctrine as it relates to murder.

On April 10, 2019, the Supreme Court transferred the matter to us with directions to vacate our earlier decision and reconsider the cause in light of Senate Bill 1437.

In accordance with our Supreme Court's order, we vacate the March 3, 2016 nonpublished opinion. Both Jacobo and Gutierrez have filed supplemental briefs. Jacobo raises a variety of claims related to Senate Bill 1437. He also argues, for the first time, that the trial court erred by instructing the jury with a portion of CALCRIM No. 875. Both appellants argue that the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements in light of Senate Bill 620's amendment of Penal Code sections 12022.53 and 12022.5.[1] Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Gutierrez further asserts that the imposition of restitution fines and two assessments, without a determination of his ability to pay, violated his due process and equal protection rights.

We affirm the judgments of conviction, but vacate appellants' sentences and remand for resentencing. Our decision regarding appellants' previously raised claims of error remains the same as in our original opinion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *People's evidence*

Viewed in the light most favorable to the judgment (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303—1304), the

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[1] All further undesignated statutory references are to the Penal Code.

evidence relevant to the issues presented on appeal established the following.

a. *The shooting*

Gutierrez and Jacobo were members of the City Terrace gang, whose main rival was the Geraghty Lomas gang. On August 7, 2011, at about 1:30 a.m., Martha G. drove her van to Duke's liquor store. Martha's passengers included her husband Joel, her stepson Santiago, and Santiago's friend, Ernie. The liquor store was within territory claimed by the Geraghty Lomas gang. Ernie and Santiago went into the store to buy beer while Martha and Joel waited in the van. Santiago was walking with a crutch.

Just after Ernie and Santiago entered the liquor store, a pickup truck pulled up and parked at the front entrance. Jacobo got out of the truck and went into the liquor store, where he appeared to exchange words with either Ernie or Santiago, or both of them.[2] Jacobo made his purchase and left the store. Immediately afterward, Santiago and Ernie completed their purchase and left the store. As they were walking out the front entrance, Jacobo was sitting in the truck's front passenger seat and was in the act of pulling the truck door closed. Santiago gestured toward Jacobo and appeared to say something to him. In response, Jacobo and Gutierrez (who was sitting in the rear passenger seat) immediately got out of the truck.

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[2] Much of the evidence at trial came from video surveillance cameras that were mounted in and around the liquor store. The jury was shown a series of video clips of what occurred inside and outside the store during the incident. We have viewed the video clips, which do not have sound.

Initially, Jacobo and Gutierrez both approached Santiago, who was standing just a few steps away. Jacobo punched Santiago in the face and grabbed his crutch. Santiago began running down the sidewalk in the direction of Martha's van. Meanwhile, Gutierrez turned and approached Ernie, who had been standing slightly behind Santiago. Gutierrez swung at Ernie's head with a handgun and kicked him. Ernie fell to the ground. Gutierrez kicked Ernie again and then joined Jacobo in chasing Santiago down the sidewalk. With Gutierrez running right behind him, Jacobo chased Santiago while swinging the crutch at him. As the three men were running down the sidewalk, Joel got out of Martha's van and joined the fray in an effort to protect Santiago. The melee spilled over into an intersection. Joel and Gutierrez apparently began to fight and then Gutierrez fired his gun six times at Joel, hitting him twice.[3] Joel ran back to the van, which sped off. Jacobo and Gutierrez returned to the pickup truck and the driver sped off.

Martha testified that she was sitting in the van talking to Joel when the fight broke out. She watched Santiago and Ernie leave the liquor store, and she saw the defendants attack them. When Joel got out of the van to help Santiago, he began fighting

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[3] On the videotape, Martha's van is partially obscured from view by some fencing and Joel cannot be seen getting out of the van. However, a fourth figure suddenly comes into view in the intersection. The gunshots cannot be seen on the videotape. Because Ernie remained close to the liquor store entrance after being attacked by Gutierrez, it is apparent that Joel must be the fourth figure on the videotape. Joel was subsequently deported to Mexico and he did not testify at trial. Neither Santiago nor Ernie testified at trial.

with Gutierrez. Martha saw Gutierrez shoot at Joel five or six times. Joel ran back to the van and said he had been shot. Martha drove off, leaving Ernie behind. She drove Joel to the hospital where he was treated for gunshot wounds to his leg and hip. According to Martha, Joel, Santiago and Ernie were not armed that night.

Alfonso E. was working at Duke's liquor store that night and he recognized Ernie as a regular customer. Alfonso saw Jacobo walk in, approach Ernie and exchange words with him. Jacobo said, "Where are you [from]? This is City Terrace." Alfonso testified that Ernie replied by saying, "That's cool. No problem." However, when Alfonso was interviewed by the police, he told them that Ernie had responded: "This is Geraghty." Moments after Ernie and Santiago left the store, Alfonso heard gunfire.

The police found six expended .380-caliber shell casings in the street, five or six car lengths from Duke's liquor store.

b. *The gang evidence*

Detective Eduardo Aguirre testified as the prosecution's gang expert. He was familiar with the City Terrace gang, whose primary activities included murders, shootings, robberies, drug sales, possession of handguns, burglaries, vandalism, and stealing cars. Duke's liquor store is located at the north end of territory belonging to the Geraghty Lomas gang, about a quarter mile from the border with City Terrace territory. Geraghty Lomas is City Terrace's main rival. Their contiguous border was a source of tension between the two gangs.

Aguirre testified it would constitute a sign of disrespect for a gang member to venture into a rival gang's territory. When a gang member "hits up" a potential rival by inquiring where he is

from, this is a confrontational challenge (the speaker is asking the other person to reveal his gang affiliation) that is considered a provocation and can lead to a physical assault or a shooting if the person answers with the name of a rival gang. It is an accepted part of gang culture that a gang member must take some form of action when confronted by a rival. Backing down from a potential confrontation is frowned upon, and a gang member who did so would not only lose respect, but could possibly be ejected from the gang, assaulted, or killed. Aguirre explained that "if a gang member is disrespected out in the street, what you're supposed to do, you're supposed to act on it with some sort of violence."

Aguirre testified that gang members pass guns around among themselves and store them in safe places having no known ties to the gang. It is common for gang members to stay armed even when they are just out socializing with friends. Gang members make it a point to know whether fellow members of their gang are armed; this is "for their own protection, and in order to go and commit crimes."

Aguirre testified that both defendants were members of the City Terrace gang. Jacobo, who was 31 or 32 years old, had been a member since he was 15. Jacobo had personally admitted his membership to Aguirre. Gutierrez, who was younger, had been a member of the City Terrace gang for only four or five years. It was stipulated that Gutierrez was a member of City Terrace on the night Joel was shot.

Asked a hypothetical question based on the evidence in this case, Aguirre opined that the shooting had been committed for the benefit of the City Terrace gang. Following the hostile encounter inside the liquor store, Jacobo was just getting back

into the truck when Santiago walked by and apparently said something provocative: "That showed an outright disrespect to the older gang member [i.e., Jacobo], as well as to the younger gang member [i.e., Gutierrez] in the car. And at that point, both City Terrace gang members had no choice but to act and either assault, shoot or kill the persons that disrespected them."

2. *Procedure*

The jury convicted both Jacobo and Gutierrez of premeditated attempted murder and assault with a deadly weapon, a crutch, committed for the benefit of, at the direction of, or in association with, a criminal street gang. (§§ 664, 187, 245, subd. (a)(1), 186.22, subd. (b)(1)(B).) It additionally convicted Gutierrez of assault with a semiautomatic firearm, with a gang enhancement (§ 245, subd. (b)), and Jacobo of the lesser included offense of simple assault, a misdemeanor. (§§ 240, 241.) The jury further found firearm enhancement allegations true as to each defendant. (§§ 12022.5, 12022.53, subds. (b), (c), (d), (e).) The trial court sentenced Gutierrez to a determinate term of 17 years 8 months, plus a life term for the attempted premeditated murder, plus two 25-years-to-life terms. It sentenced Jacobo to a determinate term of 8 years, plus a life term for the attempted premeditated murder, plus a 25-years-to-life term. As to both defendants, the trial court imposed restitution fines, suspended parole revocation restitution fines, court operations assessments, and criminal conviction assessments.

DISCUSSION

1. *Senate Bill 1437*

While Jacobo's appeal was pending, the Legislature enacted Senate Bill 1437. That legislation, which took effect on January 1, 2019, "addresses certain aspects of California law regarding

felony murder and the natural and probable consequences doctrine." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).) Prior to Senate Bill 1437's enactment, a person who knowingly aided and abetted a crime, the natural and probable consequence of which was murder or attempted murder, could be convicted of not only the target crime but also of the resulting murder or attempted murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 161 (*Chiu*); *In re R.G.* (2019) 35 Cal.App.5th 141, 144.) "This was true irrespective of whether the defendant harbored malice aforethought. Liability was imposed ' "for the criminal harms [the defendant] . . . naturally, probably, and foreseeably put in motion." [Citations.]' [Citation.]" (*In re R.G.*, at p. 144.) Aider and abettor liability under the doctrine was thus "vicarious in nature." (*Chiu*, at p. 164.)

Senate Bill 1437 "redefined 'malice' in section 188. Now, to be convicted of murder, a principal must act with malice aforethought; malice can no longer 'be imputed to a person based solely on [his or her] participation in a crime.' (§ 188, subd. (a)(3).)" (*In re R.G.*, *supra*, 35 Cal.App.5th at p. 144.) Senate Bill 1437 also amended section 189, which defines first and second degree murder, by, among other things, adding subdivision (e). Under that subdivision, a participant in enumerated crimes is liable under the felony murder doctrine only if he or she was the actual killer; or, with the intent to kill, aided and abetted the actual killer in commission of first degree murder; or was a major participant in the underlying felony and acted with reckless indifference to human life. (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3; *People v. Munoz* (2019) 39 Cal.App.5th 738, 749 (*Munoz*); *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1099—1100 (*Lopez*).) Senate Bill 1437 thus ensures that murder

liability is not imposed on a person who did not act with implied or express malice, or—when the felony murder doctrine is at issue—was not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life. (*Munoz*, at pp. 749—750; Stats. 2018, ch. 1015, § 1, subds. (f), (g); *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147.)

Senate Bill 1437 also added section 1170.95, which permits persons convicted of murder under a felony murder or natural and probable consequences theory to petition in the sentencing court for vacation of their convictions and resentencing. (Stats. 2018, ch. 1015, § 4; *Martinez*, *supra*, 31 Cal.App.5th at p. 723.) An offender may file a section 1170.95 petition if he or she was prosecuted under a felony murder or natural and probable consequences theory, but under amended sections 188 or 189, could not have been convicted of first or second degree murder. (§ 1170.95, subd. (a).) If the petitioner makes a prima facie showing that he or she is entitled to relief, the trial court must conduct a hearing to determine whether to vacate the murder conviction and resentence the petitioner. (§ 1170.95, subds. (c), (d)(1); *Martinez*, at pp. 723—724.) At such a hearing, both the prosecution and the defense may rely on the record of conviction or may offer new or additional evidence. (§ 1170.95, subd. (d)(3).)

a. *Application here*

The trial court here instructed the jury that it could convict Jacobo of attempted murder if either (1) he was a direct aider and abettor or (2) he committed assault and attempted willful, deliberate, and premeditated murder was a natural and probable consequence of that crime. The court further instructed that Jacobo was guilty of *premeditated* attempted murder if either he

or Gutierrez acted willfully and with premeditation and deliberation.

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Jacobo argues that Senate Bill 1437 applies retroactively to him on direct appeal, and requires reversal of his attempted murder conviction and the associated premeditation finding. Jacobo's contentions fail because Senate Bill 1437 is not retroactive on direct appeal; and in any event, the legislation applies only to persons convicted of murder, not attempted murder.[4]

(i) *Senate Bill 1437 does not apply retroactively.*

Generally, penal statutes do not operate retroactively. (§ 3; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) But, under the rule of *Estrada*, a statute lessening punishment is presumed to apply to cases that are not yet final on the statute's effective date, unless the Legislature clearly signals its intent to make the amendment prospective, either by including an express saving clause or its equivalent. (*Estrada*, *supra*, 63 Cal.2d at pp. 745—748; *People v. DeHoyos* (2018) 4 Cal.5th 594, 600 (*DeHoyos*); *Martinez*, *supra*, 31 Cal.App.5th at pp. 724—725.)

Proposition 36, the Three Strikes Reform Act of 2012, and Proposition 47, the Safe Neighborhoods and Schools Act, both created postconviction procedures by which defendants could seek

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[4] Our Supreme Court is currently considering whether Senate Bill 1437 applies retroactively to cases not yet final on appeal, whether the legislation eliminates second degree murder liability under the natural and probable consequences doctrine, and whether instruction on the doctrine was error. (*People v. Gentile* (2019) 35 Cal.App.5th 932, rev. granted Sep. 11, 2019 (S256698, 2019 Cal. Lexis 6665).

resentencing for offenses that, due to changes wrought by those propositions, might be available to them. (§§ 1170.126, 1170.18.) *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*) and *DeHoyos*, *supra*, 4 Cal.5th 594, concluded the new laws were not retroactive on direct appeal. (*Conley*, at pp. 661—662; *DeHoyos*, at p. 597.)

Martinez concluded the same is true in regard to Senate Bill 1437. "The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95." (*Martinez*, *supra*, 31 Cal.App.5th at p. 727.) The petitioning procedure "does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Ibid.*) That section 1170.95 allows the parties to "go beyond the original record in the petition process, a step unavailable on direct appeal," also amounts to "strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure," and demonstrates Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases. (*Martinez*, at pp. 727—728; accord, *Munoz*, *supra*, 39 Cal.App.5th at pp. 751—752; *Lopez*, *supra*, 38 Cal.App.5th at pp. 1113—1114; *In re R.G.*, *supra*, 35 Cal.App.5th at pp. 145—146; *People v. Anthony*, *supra*, 32 Cal.App.5th at pp. 1147—1153.) Thus, Senate Bill 1437 should "not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez*, at p. 727.)

Jacobo raises a variety of arguments in support of a contrary conclusion, but none are persuasive. First, he posits that we must infer, from its order requiring us to reconsider the cause in light of Senate Bill 1437, that our Supreme Court agrees he need not proceed by way of the section 1170.95 petitioning procedure. We do not interpret the Supreme Court's order in this fashion. Jacobo relies on *People v. Gentile*, *supra*, 35 Cal.App.5th 932, but after his brief was filed, as noted, review was granted in *Gentile* and the opinion was depublished. (*People v. Gentile*, *supra*, S256698.) Therefore, *Gentile* may no longer be cited. (Cal. Rules of Court, rule 8.1115; *People v. Mendoza* (2015) 240 Cal.App.4th 72, 81.)

Jacobo asserts that *Conley* and *DeHoyos* are distinguishable because the petition procedures implemented by Propositions 36 and 47 are different than that created by Senate Bill 1437. In enacting Propositions 36 and 47, the electorate limited relief to statutorily defined defendants, i.e., those who had not suffered disqualifying convictions, and whom the trial court found would not present an unreasonable risk to public safety if released. In contrast, Jacobo argues, the section 1170.95 petition procedure was not designed to balance public safety concerns against "excessive sentences." In his view, the Legislature's uncodified findings and declarations—including that sentencing should be commensurate with culpability—compel a conclusion that the legislation is retroactive. (See Stats. 2018, ch. 1015, § 1.) We disagree. As *Martinez* explained when rejecting a similar contention, although section 1170.95 does not require a dangerousness inquiry, neither *Conley* nor *DeHoyos* held that inquiry was the "indispensable statutory feature on which the result in those cases turned." (*Martinez*, *supra*,

31 Cal.App.5th at p. 728; *Munoz*, *supra*, 39 Cal.App.5th at pp. 752—753; *People v. Anthony*, *supra*, 32 Cal.App.5th at pp. 1153—1154.) And, because the Legislature provided a path of relief via the section 1170.95 petition procedure, the conclusion that Senate Bill 1437 does not apply retroactively on direct appeal does not conflict with the Legislature's stated intent.

Jacobo's citation to *People v. Valenzuela* (2019) 7 Cal.5th 415, is likewise unavailing. There, the defendant's felony grand theft conviction provided the "felonious criminal conduct" element upon which a second conviction, for street terrorism, was predicated. (*Id.* at pp. 418—419.) Reduction of the theft conviction to a misdemeanor, pursuant to Proposition 47, required dismissal of the street terrorism conviction, because it negated an essential element of the street terrorism crime. (*Id.* at p. 427.) When a defendant is resentenced under Proposition 47, *Valenzuela* explained, the trial court must reevaluate the continued applicability of enhancements based on a prior felony conviction. (*Valenzuela*, at p. 425; *People v. Buycks* (2018) 5 Cal.5th 857, 894.) *Valenzuela* does not suggest Senate Bill 1437 is retroactive on direct appeal. In fact, Valenzuela obtained reduction of his theft conviction via Proposition 47's petitioning procedure, *not* on direct appeal. (*Valenzuela*, at p. 420.) And we are not here concerned with designation of a prior conviction *after* the appropriate petitioning procedure has been used.

Jacobo points to several portions of section 1170.95 as evidence of retroactivity. Neither the fact that section 1170.95 provides for the appointment of counsel in connection with a petition, nor its provision that the parties may rely on the record of conviction at a section 1170.95 hearing, suggest retroactivity.

(See § 1170.95, subds. (c), (d)(3).) Nor does section 1170.95, subdivision (f)'s proviso that "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner" suggest retroactivity. *Martinez* explained that *Conley* rejected a similar argument concerning an analogous provision in Proposition 36. (*Martinez*, *supra*, 31 Cal.App.5th at p. 729.) *Martinez* reasoned, "We reach the same conclusion here, where there is no indication that reversal of a defendant's sentence on direct appeal without compliance with the procedures outlined in section 1170.95 was among the 'rights' the Legislature sought to preserve in enacting Senate Bill 1437." (*Ibid*; *People v. Anthony*, *supra*, 32 Cal.App.5th at p. 1157.)

Equally meritless is Jacobo's contention that requiring a defendant to proceed via a section 1170.95 petition would violate his Sixth Amendment right to a jury trial. The retroactive relief afforded by Senate Bill 1437 is "not subject to Sixth Amendment analysis. Rather, the Legislature's changes constituted an act of lenity that does not implicate defendants' Sixth Amendment rights." (*People v. Anthony*, *supra*, 32 Cal.App.5th at p. 1156; *Lopez*, *supra*, 38 Cal.App.5th at pp. 1114—1115.) Neither this court's opinion in *People v. Arevalo* (2016) 244 Cal.App.4th 836, nor the United States Supreme Court's decision in *In re Winship* (1970) 397 U.S. 358, suggest otherwise.

(ii) *Senate Bill 1437 does not apply to attempted murder convictions.*

Jacobo is not entitled to relief pursuant to Senate Bill 1437 for a second reason: Senate Bill 1437 does not apply to the offense of attempted murder. (*Munoz*, *supra*, 39 Cal.App.5th at p. 753; *Lopez*, *supra*, 38 Cal.App.5th at p. 1103.)

When interpreting a statute, our fundamental task is to determine the Legislature's intent. We begin by examining the statute's words, giving them their usual and ordinary meaning. (*People v. Colbert* (2019) 6 Cal.5th 596, 603; *People v. Ruiz* (2018) 4 Cal.5th 1100, 1105—1106.) If not ambiguous, the plain meaning of the statutory language controls. (*Colbert*, at p. 603; *Ruiz*, at p. 1106; *In re C.H.* (2011) 53 Cal.4th 94, 100.) As we recently explained in *Munoz*, the plain language of sections 188, 189, and 1170.95 speak only in terms of murder, not attempted murder. (*Munoz*, *supra*, 39 Cal.App.5th at p. 754.) Senate Bill 1437 is not ambiguous; by its plain terms, it does not extend to Jacobo's offense of attempted murder. (*Munoz*, at p. 754; *Lopez*, *supra*, 38 Cal.App.5th at pp. 1104—1105; see *People v. Jillie* (1992) 8 Cal.App.4th 960, 963 ["We do not find the statute ambiguous. It expressly identifies the offenses within its scope, all of which are completed offenses. Had the Legislature meant to include attempts among the covered offenses, it could easily have done so"].)

Jacobo argues that Senate Bill 1437's failure to mention attempted murder is of no moment for two reasons. First, he argues that given the amendments to sections 188 and 189, Senate Bill 1437 "did not need to refer facially to attempted murder." He maintains that attempted murder is now defined by section 189, subdivision (e),[5] and therefore Senate Bill 1437's

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[5] Section 189, subdivision (e), provides that a "participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the

failure to mention attempted murder is inconsequential. This argument is not persuasive. Murder is defined in section 187 as the unlawful killing of a human being, or a fetus, with malice aforethought. An attempt consists of "two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; see *People v. Fontenot* (2019) 8 Cal.5th 57, 64; *People v. Perez* (2010) 50 Cal.4th 222, 229.) Senate Bill 1437 did not amend these principles. Certainly, subdivision (e) of section 189 does not purport to offer a new definition of attempted murder; it speaks of the "actual killer" and of a felony in which "a death occurs." Obviously, when there is an actual killer and a death, the crime is *murder*, not *attempted* murder. Instead, subdivision (e) pertains to the circumstances by which a person may be found guilty on a felony murder theory. (See *Lopez*, *supra*, 38 Cal.App.5th at pp. 1099, 1103 & fn. 9; *Munoz*, *supra*, 39 Cal.App.5th at pp. 749–750.)

Second, Jacobo argues that attempted murder is a lesser included offense of murder, and therefore "[t]here was no reason for the Legislature" to expressly refer to it. (See *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 ["California appellate courts have repeatedly accepted the principle that attempt is a lesser included offense of any completed crime"].) However, it is not clear that attempted murder is, in fact, a lesser included offense of murder. In *People v. Bailey* (2012) 54 Cal.4th 740, our Supreme Court concluded that the principle that attempt is a

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commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

lesser included offense of any completed crime was "not applicable" where "the attempted offense includes a particularized intent that goes beyond what is required by the completed offense." (*Id.* at pp. 752–753; see *People v. Fontenot*, *supra*, 8 Cal.5th at p. 65 [attempted kidnapping is not a lesser included offense of completed kidnapping for purposes of § 207, subd. (a)].)

But even assuming arguendo that attempted murder is a lesser included offense of murder, this does not explain away the fact the plain statutory language omits any reference to attempted murder. As we recently explained in *Munoz*, the text of Senate Bill 1437's uncodified statement of legislative findings and declarations, as well as the Legislature's use of the word "attempted" in section 189, subdivision (e) when referring to the underlying felony, but omission from the same sentence when addressing the participant's liability for murder, is telling. (*Munoz*, *supra*, 39 Cal.App.5th at p. 757.) And, when the Legislature wishes a statute to encompass both a completed crime and an attempt, it knows how to say so. (*Ibid.*; see, e.g., §§ 12022.53, subd. (a)(18), 12022, subd. (a)(1), 667.5, subd. (c)(12), 1192.7, subd. (c)(22), (39).) The inescapable conclusion is that the Legislature intended to exclude attempted murder from Senate Bill 1437's ambit.

2. *Sufficiency of the evidence*

Having determined that enactment of Senate Bill 1437 has no effect on Jacobo's convictions, we turn to appellants' specific contentions of error, starting with their claims of evidentiary insufficiency.

a. *Standard of review*

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Penunuri* (2018) 5 Cal.5th 126, 142.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Salazar*, at p. 242.) We must accept logical inferences the trier of fact might have drawn from the evidence. (*Ibid.*) The federal standard of review is the same. (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; *People v. Jackson* (2014) 58 Cal.4th 724, 749.)

b. *There was sufficient evidence Gutierrez was guilty of assault with a deadly weapon.*

Gutierrez contends there was insufficient evidence to support his conviction for aiding and abetting Jacobo's assault on Santiago with a deadly weapon—i.e., Santiago's crutch. There is no merit to this claim.

Under California law, all persons involved in the commission of a crime are principals whether they commit the act

constituting the offense, or merely aid and abet in its commission. (§ 31.) A direct aider and abettor must act with knowledge of the perpetrator's criminal purpose, with the intent to commit, encourage, or facilitate the commission of the offense, and by an act or advice to aid, promote, encourage, or instigate the commission of that crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) Aiders and abettors share the perpetrator's guilt and criminal liability. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Gutierrez argues there was no evidence he intended "to encourage or facilitate the assault of Santiago," or that "he had any knowledge Jacobo would ever swing a crutch." But this argument is plainly contradicted by the surveillance videotapes, which vividly captured (from several angles) what happened in front of the liquor store when Gutierrez and Jacobo got out of the truck. Initially, Gutierrez and Jacobo both approached Santiago.

But when Jacobo began assaulting Santiago, Gutierrez turned toward Ernie – who was standing behind Santiago – and assaulted him. Gutierrez attempted to hit Ernie in the head with a handgun and kicked him, leaving Ernie on the ground. At that point, Gutierrez turned away from Ernie and joined Jacobo in chasing Santiago down the sidewalk. The videotape clearly shows Gutierrez joining the pursuit of Santiago, running just a step or two behind Jacobo as Jacobo chases Santiago while swinging the crutch at him.

Thus, the jury could have reasonably concluded that Gutierrez encouraged and facilitated Jacobo's attack on Santiago by initially subduing Ernie so that Ernie would not be able to come to Santiago's aid, by joining Jacobo as he pursued Santiago down the sidewalk while swinging the crutch at him, and then by fighting with Joel in the street when Joel came to Santiago's aid.

There was ample evidence that Gutierrez aided and abetted Jacobo's assault on Santiago with the crutch.

c. *The evidence was sufficient to prove Jacobo committed premeditated attempted murder*.

Jacobo contends there was insufficient evidence to sustain his conviction for aiding and abetting Gutierrez's premeditated attempted murder of Joel. We disagree.

As we have explained, at the time of appellants' trial, an aider and abettor could be convicted of attempted murder either as a direct aider and abettor, or under the natural and probable consequences doctrine. (See *Chiu*, *supra*, 59 Cal.4th at p. 161; *People v. Smith* (2014) 60 Cal.4th 603, 611 [" ' if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault' "].) The

touchstone under the latter theory is foreseeability. " 'A nontarget offense is a " 'natural and probable consequence' " of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability " 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." ' [Citation.]" (*Smith*, at p. 611; *Chiu*, at pp. 161—162.)

The jury here could have found it reasonably foreseeable that a fatal shooting would result when Gutierrez and Jacobo left the truck and began assaulting Santiago and Ernie in response to Santiago's perceived disrespectful conduct. *People v. Montes* (1999) 74 Cal.App.4th 1050, is instructive. There, members of the defendant's gang surrounded the victim, Garcia—a former member of a rival gang—in a parking lot. When Garcia brandished a switchblade, Montes hit him with a chain as Montes's fellow gang members closed in. (*Id.* at p. 1053.) When Montes's group retreated and Garcia prepared to drive away, a member of Montes's gang retrieved a gun and shot Garcia. The court upheld Montes's attempted murder conviction as properly predicated on a natural and probable consequence theory. The court reasoned that the facts represented a "textbook example of how a gang confrontation can easily escalate from mere shouting and shoving to gunfire." (*Id.* at p. 1055.) Observing "the great potential for escalating violence during gang confrontations," the court concluded: "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and

we see no reason the courts should turn a blind eye to them." (*Id*. at p. 1056.)

Similarly, here, it was readily foreseeable that the assault would escalate into an attempted murder. The assault was gang-related. Appellants were City Terrace gang members, who had ventured into the territory of their chief rival, Geraghty Lomas. Jacobo participated in issuance of a verbal gang challenge inside the liquor store. There was evidence Ernie responded to Jacobo's "where are you from" challenge with the words, "This is Geraghty." Santiago, Ernie, or both of them interacted with Jacobo in a manner appellants perceived as disrespectful—a circumstance which, in gang culture, required a violent response. Predictably, Jacobo then initiated the physical assault against his gang rivals in front of the store, and chased Santiago while beating him with the crutch. Given these facts and the expert's testimony, it was reasonably foreseeable that Gutierrez, Jacobo's fellow City Terrace gang member, would end up trying to kill someone in the ensuing melee. (See also, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 916 [where gang members issued a verbal "where are you from" challenge to rival gang member, precipitating a fistfight, fatal shooting was reasonably foreseeable]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10—11 [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1375—1376 [where gang members confronted and punched victim, whom they believed had disrespected their gang, "escalation of this confrontation to a deadly level was much closer to inevitable than it was to unforeseeable"]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499—500 [fatal stabbing of

rival gang member after confrontation and fistfight was natural and probable consequence of fistfight].)[6]

Jacobo argues that attempted murder requires an intent to kill, and there was no evidence he had such an intent. But, when a conviction is based on the natural and probable consequences doctrine, such intent is not required. Criminal liability under the doctrine is " 'not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all.' " (*Chiu*, *supra*, 59 Cal.4th at p. 164.) Accordingly, the aider and abettor's mens rea is irrelevant, and culpability is imposed " 'simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*Ibid.*; *People v. Williams* (1997) 16 Cal.4th 635, 691 [a "defendant guilty as an aider and abettor under the 'natural and probable consequences' doctrine need not share the perpetrator's intent to kill"].)

Jacobo seeks to avoid this result by challenging the application of the natural and probable consequences doctrine in the first instance. Primarily, he launches his attack via a challenge to the trial court's instruction with CALCRIM No. 402, the standard instruction setting forth the relevant legal principles.[7] Jacobo claims that CALCRIM No. 402 diluted the

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[6] The People argue that the evidence was also sufficient to prove Jacobo's guilt via a direct aiding and abetting theory. In light of our conclusion that the evidence was sufficient to support the jury's verdict under the natural and probable consequences theory, we do not reach this argument.

[7] CALCRIM No. 402 informed the jury that Jacobo could be found guilty of premeditated attempted murder if he committed the offenses of assault with a deadly weapon, or simple assault; a

reasonable doubt standard by relieving the prosecution of the burden of establishing his intent, thereby violating his due process rights. In essence, Jacobo argues that we should hold the natural and probable consequences doctrine unconstitutional.

We decline Jacobo's invitation. Our Supreme Court has held that, although the doctrine has been subjected to substantial criticism, it is "an 'established rule' of American jurisprudence" that has been "embrace[d]" in California. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 260.) The court has rejected claims that the doctrine is unconstitutional because it allows the jury to find a defendant vicariously liable, presumes malice, and allows criminal liability based on a negligence standard. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107 [rejecting contention that the natural and probable consequences doctrine unconstitutionally imposes criminal liability based on a negligence standard]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 184—185 [rejecting claim that the natural and probable consequences doctrine violates due process by permitting conviction based on vicarious negligence theory, without a finding of intent]; *People v. Richardson* (2008) 43 Cal.4th 959, 1021—1022 [rejecting claim that doctrine unconstitutionally presumes malice].) We are not at liberty to ignore these holdings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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coparticipant in those crimes committed attempted willful, deliberate, and premeditated murder; and such an attempted murder was a natural and probable consequence of the target crimes.

Jacobo argues that Senate Bill 1437 has abrogated the natural and probable consequence doctrine, rendering CALCRIM No. 402 erroneous. (See *Lopez*, *supra*, 38 Cal.App.5th at pp. 1100, 1102 ["Senate Bill 1437 eliminates liability for murder under the natural and probable consequences doctrine" and "[m]alice is now an essential element" of murder, other than felony murder].) But, as explained, Senate Bill 1437 does not apply to Jacobo's crime of attempted murder, and in any event the law is not retroactive on direct appeal. Therefore, passage of the legislation has no effect in Jacobo's case.

Also without merit is Jacobo's related argument that the evidence was insufficient to support the jury's finding, as to him, that the murder was willful, deliberate, and premeditated. In this regard, Jacobo attacks the trial court's instruction with CALCRIM No. 601, which stated that the jury could find the premeditation allegation true if either he *or* Gutierrez acted willfully and with premeditation and deliberation.[8] Allowing the jury to impute Gutierrez's mental state to him, he argues, violated his federal due process rights by obviating the requirements that the prosecution prove all elements of the offense and the jury find true every fact increasing punishment beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.)

In *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), the jury found two attempted murders were willful, deliberate, and

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[8] CALCRIM No. 601 stated, in pertinent part: "As to defendant Gerardo Jacobo, the attempted murder was done willfully and with deliberation and premeditation if either the defendant or Jose Gutierrez or both of them acted with that state of mind."

premeditated under section 664, subdivision (a).[9] (*Favor*, at pp. 871—872.) The defendant argued that the jury should have been instructed it had to find not only that the attempted murders were the natural and probable consequence of the target offenses, but also that the direct perpetrator's willfulness, deliberation, and premeditation were natural and probable consequences. (*Id.* at p. 874.)

Favor rejected this argument, holding: "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Favor*, *supra*, 54 Cal.4th at p. 872.) Section 664, subdivision (a), did not create a greater degree of attempted murder, but constituted a penalty provision that prescribed an increased punishment. (*Favor*, at pp. 876–877.) "Because section 664(a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' [Citation.]" (*Id.* at p. 879.) "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was

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9 Under section 664, subdivision (a), a person guilty of attempted murder generally will be punished by a term of five, seven, or nine years. However, if the People plead and prove that the attempted murder was willful, deliberate, and premeditated, the punishment is life in prison. (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 82 (*Gallardo*).)

committed willfully, deliberately and with premeditation." (*Id.* at p. 880.)

At present, *Favor* remains good law and compels rejection of Jacobo's claim.[10] Our Supreme Court previously granted review in *People v. Mateo*, *supra*, S232674, to consider the following issue: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) [570] U.S. [99] [133 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155?" (<http://appellatecases.courtinfo.ca.gov> [as of Oct. 31, 2019], archived at <https://perma.cc/XNK4-HTW8>.) The court subsequently transferred the matter back to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of Senate Bill 1437, without deciding the issue. Therefore, the question posed in *Mateo* remains unanswered. Unless and until our Supreme Court overrules *Favor*, it is binding on this court and precludes Jacobo's argument. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

Jacobo's attempts to circumvent *Favor* do not carry the day. Contrary to his assertion, *Chiu*, *supra*, 59 Cal.4th 155, does not hold it is impermissible to base a premeditated attempted murder verdict on the natural and probable consequences doctrine. *Chiu* held that "an aider and abettor may not be

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[10] Accordingly, we do not address the People's contention that Jacobo has forfeited his challenge to CALCRIM No. 601.

convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Chiu*, at pp. 158–159.) But Jacobo was convicted of premeditated *attempted* murder, not premeditated murder, and therefore *Chiu* is inapplicable. *Chiu* declined to overrule *Favor*, instead distinguishing it on the basis that (1) premeditation and deliberation is an element of first degree murder, whereas premeditation and deliberation simply increase the penalty for attempted premeditated murder; (2) *Favor*, but not *Chiu*, involved a question of legislative intent; and (3) the consequences of imposing liability for premeditated attempted murder are less severe than for first degree premeditated murder.[11] (*Chiu*, at p. 163.) *Chiu* thus does not compel reversal of the premeditation and deliberation finding.

We observe that the majority in *People v. Mejia* (2019) 40 Cal.App.5th 42, recently held otherwise. There, as here, the defendant was found guilty of attempted premeditated murder on a natural and probable consequences theory. (*Id.* at pp. 43, 50.) The *Mejia* majority concluded that *Chiu*'s reasoning applies equally to attempted premeditated murder. *Chiu*'s "critical holding"—that the perpetrator's mental state of premeditation and deliberation is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine—was equally compelling in the context of attempted premeditated murder. (*Mejia*, at p. 49.) And, just as a murderer's premeditative mental state has no effect on the resultant harm, the same was true as to attempted premeditated murder. (*Id.* at pp. 49—50; see *Chiu*, *supra*, 59 Cal.4th at p. 166.) But whatever the merits of the *Mejia* majority's reasoning, we

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[11] As explained *ante*, and contrary to Jacobo's arguments, Senate Bill 1437 does not affect *Favor*'s application to this case.

agree with Justice Bedsworth's dissenting opinion. Therein, he explained: "My colleagues have concluded there is 'no principled . . . distinction' between *Favor* and *Chiu*, and they may be right. [Citation.] But my understanding of stare decisis is that the Supreme Court tells *us* whether that is the case. Until they do, I feel *Auto Equity Sales, Inc. v. Superior Court*[, *supra*, 57 Cal.2d at p. 455], requires us to follow *Favor*." (*Mejia*, at p. 54, dis. opn. of Bedsworth, J.)

Jacobo also argues that *Favor* considered only state law, and therefore does not preclude his federal claims. Citing, e.g., *In re Winship*, *supra*, 397 U.S. 358; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Carella v. California* (1989) 491 U.S. 263; *Francis v. Franklin* (1985) 471 U.S. 307; and *Mullaney v. Wilbur* (1975) 421 U.S. 684, he contends that CALCRIM No. 601 violated his due process rights by relieving the People of the burden of proving each element of the offense, functioning as a mandatory presumption, and shifting the burden of persuasion to him.

But these contentions all depend on the premise that premeditation and deliberation are elements of the offense. Our Supreme Court has held that section 664, subdivision (a)—which imposes increased punishment when an attempted murder is willful, deliberate, and premeditated—is a penalty provision and does not create a greater offense. (*Chiu*, *supra*, 59 Cal.4th at p. 162; *Favor*, *supra*, 54 Cal.4th at pp. 876—877, 879.) Thus, for a natural and probable consequences aider and abettor, premeditation is not an element. Further, as noted *ante*, our Supreme Court has repeatedly rejected the argument that the natural and probable consequences doctrine unconstitutionally presumes malice on the part of the aider and abettor. "To the extent [defendant] contends that imposition of liability for

murder [as] an aider and abettor under this doctrine violates due process by substituting a presumption for, or otherwise excusing, proof of the required mental state, she is mistaken." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 107; *People v. Richardson*, *supra*, 43 Cal.4th at p. 1021; *People v. Garrison* (1989) 47 Cal.3d 746, 777—778 [rejecting argument that instruction on natural and probable consequence doctrine created a mandatory presumption].)

Nor does *Rosemond v. United States* (2014) 572 U.S. 65, assist Jacobo. There, a defendant was charged with aiding and abetting under a federal statute that prohibited using a gun in connection with a drug trafficking crime. (*Id.* at p. 68.) The high court held that to be found guilty, the aider and abettor did not have to personally use or possess a gun, but he did have to know in advance of the crime that his confederate would carry one. (*Id.* at pp. 74—75, 77—78.) Jacobo cites *Rosemond* for the proposition that an aider and abettor must have a state of mind extending to the entire crime. (*Id.* at pp. 75—76.) But, *Rosemond* did not consider the application or validity of the natural and probable consequences doctrine, and is thus inapt. Indeed, in a footnote, the court observed that the natural and probable consequences doctrine was not an issue in the case, and expressed no view upon it. (*Id.* at p. 76, fn. 7.)

Finally, we reject Jacobo's argument that CALCRIM No. 601 and *Favor* are incompatible with *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Alleyne v. United States* (2013) 570 U.S. 99, and *United States v. Haymond* (2019) __ U.S. __ [2019 U.S. Lexis 4398]. *Apprendi* held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury and proved

beyond a reasonable doubt. (*Apprendi*, at p. 490.) *Alleyne* held that any fact that increases the mandatory minimum penalty for a crime is an element and likewise must be proved to the jury beyond a reasonable doubt. (*Alleyne*, at p. 108; *People v. Henriquez* (2017) 4 Cal.5th 1, 48.) Although his argument is not entirely clear, presumably Jacobo intends to assert that *Favor*'s reasoning—that section 664, subdivision (a), is merely a penalty provision—cannot stand in light of *Alleyne*. However, as *People v. Gallardo* explained, *Alleyne* was decided approximately one year before *Chiu*, and although *Chiu* addressed *Favor* at length, it did not suggest *Alleyne* had undermined *Favor*. (*People v. Gallardo*, *supra*, 18 Cal.App.5th at pp. 85–86.)

In sum, the evidence was sufficient, and the challenged jury instructions were not constitutionally infirm.

3. *Gang expert testimony was properly admitted*.

Defendants contend the trial court erred by allowing Detective Aguirre, the prosecution gang expert, to give certain testimony. We disagree.

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), Jacobo asserts that Detective Aguirre should not have been allowed to testify that gang members typically know whether fellow gang members are carrying firearms, and that sometimes gang members have no choice but to assault, shoot, or kill persons being disrespectful to them. Jacobo argues this testimony was *irrelevant* and constituted an improper opinion as to his subjective knowledge and intent, issues that properly should have been reserved for the jury.

In this case, the gang expert testimony was unquestionably relevant. "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only

tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see also *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1369 ["[e]vidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent"]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative."].)

Here, Detective Aguirre's testimony provided the jurors with the information they needed to understand how an apparently innocuous verbal interchange inside the liquor store could have exploded so quickly into the vicious physical assault in front of the store, followed by the shooting of Joel in the intersection. According to the time stamps on the surveillance videotapes, the entire incident—from the moment Jacobo entered the liquor store until Joel left Martha's van and was shot—took only a little more than two minutes.

Jacobo's reliance on *Killebrew* to attack Aguirre's hypothetical-based testimony is misplaced. "A gang expert may render an opinion that facts assumed to be true in a hypothetical

question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) This is true even if the gang expert's opinion in effect answers an ultimate issue in the case. In *People v. Vang* (2011) 52 Cal.4th 1038, the court stated, "[t]o the extent *Killebrew* . . . purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case 'simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact.' [Citation.] But, to the extent the testimony responds to hypothetical questions, as in this case (and, it appears, in *Killebrew* itself), such testimony does no such thing. Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether the defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case." (*Id.* at pp. 1047—1049, fns. omitted.)[12]

The crucial distinction is the difference between testifying about a particular person's mental state and testifying about the mental states of gang members in general. Here, based on his

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[12] Jacobo also cites *In re Frank S.* (2006) 141 Cal.App.4th 1192, but that case was decided by the same Court of Appeal that decided *Killebrew* and used a similar analysis. (*In re Frank S.*, at pp. 1197—1198.)

knowledge of the general habits and culture of gang members, Aguirre properly testified about gang members in general, and he did not offer opinion testimony about the knowledge or intent of defendants in this case. The trial court did not err by admitting his testimony.

4. *Other claims of instructional error*

In addition to Jacobo's challenges to CALCRIM Nos. 601 and 402, appellants raise several additional claims of instructional error.

a. *Instruction on deadly weapon*

For the first time in his supplemental brief after remand, Jacobo asserts that the trial court erred by instructing that "A *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 875, italics original.) He avers that the instruction was flawed because "a crutch is not an inherently deadly weapon as a matter of law." He argues the instruction should have stated that an object is deadly or dangerous if it was both capable of causing, *and* likely to cause, death or great bodily injury.

There are two answers to this contention, both short. First, Jacobo did not raise this issue in his original briefing in the case. Our Supreme Court did not grant review on the question, and did not remand for consideration of it. Jacobo did not seek permission from this court to raise this wholly new issue in his supplemental briefing. (See Cal. Rules of Court, rule 8.200(b)(2) [after remand or transfer from the Supreme Court, "Supplemental briefs must be limited to matters arising after the previous Court of Appeal decision in the cause, unless the

presiding justice permits briefing on other matters.") Thus, the issue is not cognizable at this juncture.

Second, Jacobo's argument is based upon a misreading of the record. The instruction he challenges does, in fact, say exactly what he says it should: the item must be both capable of *and* likely to cause death or great bodily injury. (See *In re B.M.* (2018) 6 Cal.5th 528, 533 [object alleged to be a deadly weapon under section 245, subdivision (a)(1) "must be used in a manner that is not only 'capable of producing' but also ' "*likely to produce* death or great bodily injury" ' "].)

b. *Trial court properly refused to instruct on voluntary intoxication.*

The jury found Jacobo guilty of assaulting Joel with a deadly weapon, a crutch. Jacobo contends the trial court erred by refusing to instruct the jury on the defense of voluntary intoxication, which the jury should have considered in determining his culpability for the charged crimes. We are not persuaded.

Defense counsel for Jacobo asked for a jury instruction on voluntary intoxication, arguing that the surveillance videotape showed Jacobo staggering on his way into the liquor store: "The video shows the defendant staggering. When he gets out of the truck, he misses a step getting out of the truck and appears to be under the influence of an intoxicating substance." At the same time, however, defense counsel acknowledged that there was no evidence Jacobo had consumed any intoxicating substances. The prosecutor responded, "The fact that [defense counsel] can try to construe how the guy walked . . . . It's an opinion by him that this guy looks drunk. But there is no evidence that he drank or

was drunk or anything like that." The trial court concluded a voluntary intoxication instruction was not warranted.

Section 29.4, subdivision (b), provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." However, "[a] defendant is entitled to [a voluntary intoxication] instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams*, *supra*, 16 Cal.4th at p. 677; see, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 666 [although defendant smoked cocaine and drank alcohol, the evidence "did not strongly suggest [these intoxicating substances] prevented him from forming the intent to commit these crimes"]; *People v. Williams*, *supra*, at p. 678 ["no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [no evidence defendant's beer drinking "had any noticeable effect on his mental state or actions"].)

We have viewed the videotape and, frankly, we do not see Jacobo stumble when he gets out of the truck. And even if we did, there was absolutely no evidence at trial demonstrating that the stumble had been caused by an intoxicating substance that also distorted Jacobo's thought processes.

The trial court did not err by refusing to instruct the jury on voluntary intoxication.

c. *Trial court properly refused to instruct on attempted involuntary manslaughter.*

Jacobo contends the trial court erred by not instructing the jury, sua sponte, on attempted involuntary manslaughter as a lesser included offense of attempted murder. There is no merit to this claim.

"In a number of instances, courts have held that because an attempt requires that a defendant act with the specific intent to commit the attempted crime, 'a defendant cannot be convicted of attempting to commit a substantive crime that by definition must be committed unintentionally.' (1 Witkin & Epstein, *supra*, Elements, § 53, p. 263, italics omitted.) For example, the Court of Appeal in *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 . . . concluded that because the crime of involuntary manslaughter by definition involves an unintentional killing, an attempt to commit that crime 'would require that the defendant intend to perpetrate an unintentional killing – a logical impossibility,' and accordingly held that there is no crime of attempted involuntary manslaughter. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 232, fn. 7.) We ourselves have held that "there can be no crime of *attempted involuntary manslaughter*." (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54, fn. 12; accord *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710; *People v. Post* (2001) 94 Cal.App.4th 467, 481; *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.)

The trial court did not err by failing to instruct the jury on attempted involuntary manslaughter.

d. *Trial court properly refused to instruct on attempted voluntary manslaughter.*

Defendants contend the trial court erred by refusing their request to instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder. We do not agree.

(i) *Background.*

At the jury instruction conference, the defense attorneys asked for attempted voluntary manslaughter instructions based on theories of imperfect self-defense and heat of passion/sudden quarrel. Counsel argued that Martha's testimony[13] demonstrated there had been two separate fights: an initial altercation between Jacobo and Santiago that ended when Santiago ran back to the van; and then, a second altercation that occurred when Joel left the van and started fighting with Gutierrez. Defense counsel argued that, according to this evidence, Gutierrez had merely been defending himself when he shot Joel.

The prosecutor disagreed, arguing defendants had been the aggressors throughout the entire incident and that there was no evidence of sufficient provocation by the victims. The prosecutor also argued there was no evidence Gutierrez ever believed he was in imminent danger.

The trial court agreed with the prosecutor and refused to give the requested instructions. The court concluded there was no evidence of sufficient provocation, and no evidence that

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[13] Martha testified at one point that Santiago "ran inside the van, and that's when my husband Joel, he came out fighting . . . ." Nevertheless, the implication that Joel did not leave the van until after Santiago got back in is refuted by the surveillance videotapes.

Gutierrez actually believed he was in danger: "There was zero evidence that the defendant believed that he was in imminent danger of being killed or suffering great bodily injury. There is zero evidence that the defendant believed that the use of deadly force was necessary to defend." The court also stated, "This is not a heat of passion case."

(ii) *Legal principles.*

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) In this context, "substantial evidence" is evidence from which reasonable jurors could conclude the lesser offense, but not the greater, had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

"An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . . " ' [Citation.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge [citation]." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

"Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because

the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." (*In re Christian S.* (1994) 7 Cal.4th 768, 771.) "[T]he doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. . . . ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*." '. . . [¶] . . . [W]hether the defendant actually held the required belief is to be determined by the trier of fact based on all the relevant facts. It is not required to accept the defendant's bare assertion of such a fear. . . . Finally, we reiterate that, just as with perfect self-defense or any defense, '[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense*.' [Citation.]" (*Id.* at p. 783.)

(iii) *Discussion.*

The trial court correctly decided that Gutierrez was not entitled to either an imperfect self-defense attempted voluntary manslaughter instruction, or a heat-of-passion attempted voluntary manslaughter instruction, with respect to the shooting of Joel.

A. *Imperfect self-defense instruction properly refused.*

"It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created

circumstances under which his adversary's attack or pursuit is legally justified. [Citation.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1.)

The evidence demonstrated that it was the defendants who initiated the violent melee – when Jacobo punched Santiago while Gutierrez attacked Ernie – which directly led, about 15 seconds later, to Joel's shooting after he left the van to protect Santiago from defendants' attack. The defendants' concerted action reasonably implies they had a common purpose, which Gutierrez manifested when he joined Jacobo in chasing Santiago after having knocked Ernie to the ground. Thus, as to both defendants, Joel's bystander intervention was a reasonably expected occurrence and Gutierrez cannot invoke the imperfect self-defense doctrine. (See *People v. Seaton*, *supra*, 26 Cal.4th at p. 664 [no evidence supported imperfect self-defense because "defendant's testimony showed him to be the initial aggressor and the victim's response legally justified"]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179—1180 [imperfect self-defense inapplicable if defendant "creates circumstances where the victim is *legally* justified in resorting to self-defense"].)

A separate reason for refusing to instruct the jury on imperfect self-defense was the absence of any evidence showing that Gutierrez "*actually* . . . believed he was in imminent danger of death or great bodily injury" when he shot Joel. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 771; see *People v. Minifie* (1996) 13 Cal.4th 1055, 1065 [defendant claiming self-defense must " ' "prove his own frame of mind" ' "].) There was no evidence that Gutierrez shot Joel because he was afraid of him.

In sum, we conclude the trial court properly refused to instruct the jury on imperfect self-defense attempted voluntary manslaughter because there was no substantial evidence to support this theory. (See *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.)

B. *Heat-of-passion instruction properly refused.*

We find the trial court properly refused to instruct on heat-of-passion attempted voluntary manslaughter because, even assuming arguendo that Gutierrez's reason had been obscured by strong passion, there was no evidence this passion had been aroused by a legally sufficient cause. (See *People v. Pride* (1992) 3 Cal.4th 195, 250 [some evidence may, as matter of law, be insufficient to arouse homicidal rage or passion in a reasonable person]; *People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201 [" ' "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man" ' "].)

It is a general rule that adequate provocation cannot be based on mere hard looks and taunting words. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 ["voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [calling defendant a " 'mother fucker,' " and daring him to use his weapon if he had one, "plainly were insufficient to cause an average person to become so inflamed as

to lose reason and judgment"]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 740 [receiving hard looks or so-called "mad-dogging" does not constitute reasonable provocation to shoot someone].) This rule does not change just because Gutierrez belonged to a gang. (Cf. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 [indicating disapproval of a reasonable gang member standard: "Contrary to the Attorney General's argument, we are not changing the standard from objective to subjective, or replacing the reasonable 'person' standard with a reasonable 'battered woman' standard. Our decision would not, in another context, compel adoption of a ' "reasonable gang member" standard.' "].) Gutierrez's gang-based reasons for assaulting the victims in this case cannot provide the reasonable provocation needed to justify a heat-of-passion defense.

Furthermore, it is well-established that predictable conduct by a resisting victim does not constitute sufficient provocation to warrant a heat-of-passion defense. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1112 [resistance by rape victim]; *People v. Jackson* (1980) 28 Cal.3d 264, 306, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 ["defendant may have become enraged and brutally attacked and killed one of his elderly victims because she awakened during the burglary and began to scream"].) We cannot see why this rule would not apply to Gutierrez's act of shooting at Joel, whose intervention to rescue his son was just as predictable as the actions of a classic "resisting victim."

The trial court properly refused to instruct the jury on heat-of-passion attempted voluntary manslaughter.

5. *The trial court properly upheld the prosecution's assertion of the evidentiary privilege.*

Appellants ask us to determine whether the trial court properly upheld the prosecution's assertion of an evidentiary privilege relating to Detective Aguirre's gang expert testimony. We find that the trial court properly upheld the privilege.

After Aguirre testified that gang members typically know which other gang members have guns in their possession, defense counsel asked for the names of informants who had given Aguirre this information. Aguirre refused to answer, asserting a governmental privilege, pursuant to Evidence Code section 1041. Aguirre also asserted a governmental privilege pursuant to Evidence Code section 1040 when asked about his utilization of the Cal Gangs computer database during his investigation of this case. After two in camera hearings, the trial court ruled that Detective Aguirre had properly asserted privilege as to both inquiries. The court concluded the information was not material because there was no reasonable probability it would lead to any exculpatory evidence, and that there was a legitimate concern for the informant's safety.

The parties assert that, on appeal, this court should resolve the issue by reviewing the transcripts of the in camera hearings. We agree that this is the correct procedure.

Detective Aguirre asserted two different, but related, evidentiary privileges: the official information privilege (Evid. Code, § 1040) and the confidential informant privilege (Evid. Code, § 1041). "Under [Evidence Code] section 1040, a public entity has a privilege to refuse to disclose official information and to prevent another from disclosing it if disclosure of the information is against the public interest because there is a

necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure. [Citation.]" (*Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 872.) "The common law privilege for an informant's identity has been codified in Evidence Code section 1041. [Citation.] Section 1041 provides, in relevant part: '[A] public entity has a privilege to refuse to disclose the identity of a person who has furnished information [in confidence to a law enforcement officer] . . . purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state . . . if . . . (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice . . . .' " (*People v. Navarro* (2006) 138 Cal.App.4th 146, 164, fn. omitted.)

"[T]he [trial] court has the authority to hold an in camera hearing on a proper showing that the hearing is necessary to determine the claim of privilege. [¶] [Evidence Code] [s]ection 915, subdivision (b), provides: 'When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose,

without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.' " (*Torres v. Superior Court*, *supra*, 80 Cal.App.4th at p. 873.)

We have reviewed the transcripts of the in camera hearings. Based on that review, we conclude the trial court properly determined that the governmental privilege was properly asserted.

6. *Senate Bill No. 620*

At sentencing, the trial court imposed upon Gutierrez a term of 25-years-to-life for the section 12022.53, subdivision (d) enhancement and a term of four years for the section 12022.5, subdivision (a) enhancement. It imposed upon Jacobo a 25-years-to-life term for the section 12022.53 firearm enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1).[14]

When the trial court sentenced appellants in June 2013, imposition of section 12022.53 and 12022.5 firearm enhancements was mandatory, and the court lacked discretion to strike them. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273; *People v. Thomas* (1992) 4 Cal.4th 206, 213—214.) Effective January 1, 2018, the Legislature enacted Senate Bill No. 620, which amended section 12022.53, subdivision (h) and 12022.5, subdivision (c) to give trial courts authority to strike firearm enhancements in the interest of justice. (Stats. 2017, ch. 682, §§ 1, 2.) Appellants contend this matter must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements. We agree. The amendments to sections 12022.5

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[14] As to both defendants, the trial court stayed the additional section 12022.53, subdivisions (b) and (c) enhancements.

and 12022.53 apply to cases, such as appellants', that were not final when the amendments became operative. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 203; *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *Estrada*, *supra*, 63 Cal.2d at p. 745.)

The People argue that remand is inappropriate because no reasonable trial court would exercise its discretion to strike the enhancements. They insist that the trial court found no mitigating factors relating to the crimes or the defendants, the crimes involved great bodily harm, and appellants engaged in violent conduct. The People also note that as to Gutierrez, the trial court selected the middle term of four years for the section 12022.5 firearm enhancement, rather than the low term. And, they point to *People v. Jones* (2019) 32 Cal.App.5th 267, 273, which reasoned that a trial court "need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court's statements and sentencing decisions to infer what its intent would have been."

Despite the trial court's observations about the violent nature of the crimes and the absence of mitigating factors, we believe remand is appropriate to allow it to exercise its discretion in the first instance. In *People v. Billingsley* (2018) 22 Cal.App.5th 1076, for example, the trial court stated at sentencing, " 'quite frankly, this is not the kind of case [in which] I would stay the gun allegation.' " (*Billingsley*, at p. 1080.) *Billingsley* nonetheless remanded for resentencing, explaining: "although the court suggested it would not have stricken the firearm enhancement under section 12022.53, subdivision (c), even if it had that discretion, the court was not aware of the full

scope of the discretion it now has under the amended statute. ' "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." ' [Citation.]" (*Id.* at p. 1081; see *People v. Johnson* (2019) 32 Cal.App.5th 26, 69, [remanding for resentencing "out of an abundance of caution" even though trial court had not been sympathetic to either defendant at sentencing]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110—1111; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425—428.) We express no opinion about how the trial court should exercise its discretion on remand.

7. *Gutierrez has forfeited any challenge to the restitution fine and court fees.*

At sentencing, the trial court imposed upon Gutierrez a $10,000 restitution fine (§ 1202.4, subd. (b)), a suspended parole revocation restitution fine in the same amount (§ 1202.45), a $120 court operations assessment (§ 1465.8 subd. (a)(1)), and a $90 criminal conviction assessment (Gov. Code, § 70373). Gutierrez did not object or assert that he was indigent and unable to pay.

Citing *Dueñas*, *supra*, 30 Cal.App.5th 1157, Gutierrez contends that imposition of the fines and fees without a determination of his ability to pay violated his due process and equal protection rights. He maintains that we must reverse the restitution fines, strike the court fees, and remand for an ability-to-pay hearing.

But in the trial court, Gutierrez did not object to the assessments on the ground he was indigent. Section 1202.4, subdivision (d) allows a court to consider a defendant's inability to pay if the restitution fine is more than the minimum fine of $300. (*People v. Avila* (2009) 46 Cal.4th 680, 729; § 1202.4, subds. (b)(1) & (d).) Gutierrez did not avail himself of this statutory remedy to challenge the imposition of the $10,000 restitution fine. As the court imposed more than the minimum fine, Gutierrez was obligated to object to the amount of the fine and demonstrate his inability to pay anything more than the $300 minimum. Although sentencing occurred before *Dueñas* was decided, an objection to the $10,000 fines would not have been futile under governing law at the time of his sentencing hearing. (§ 1202.4, subds. (c) & (d); see also *Avila*, at p. 729.)

Contrary to Gutierrez's argument, imposition of the fines and fees without an ability-to-pay hearing did not result in an unauthorized sentence, which is reviewable on appeal even in the absence of an objection below. An unauthorized sentence is one that cannot be lawfully imposed under any circumstance in the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Imposition of the fines and fees at issue here was not unauthorized in the sense discussed in *Scott; Dueñas* does not hold that fines and fees can never be imposed, only that the defendant's ability to pay must appear as a predicate. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1172.)

In sum, by failing to object that he lacked the ability to pay the $10,000 restitution fine, Gutierrez has forfeited his challenge to that fine and to the much lower court operations and conviction assessments. Gutierrez also has forfeited his contention that the court erred by failing to determine his ability

to pay. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 353 [waiver doctrine applies to claims involving the court's failure to make or articulate discretionary sentencing choices].)[15]

DISPOSITION

Appellants' sentences are vacated and the matter is remanded for resentencing to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 and 12022.5 firearm enhancements. The judgments of conviction are otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.

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[15] Accordingly, we need not weigh in on the conflict among the cases decided after *Dueñas* addressing the forfeiture issue. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485; *People v. Frandsen* (2019) 33 Cal.App.5th 1126; *People v. Bipialaka* (2019) 34 Cal.App.5th 455; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027.)